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Church Law 1982: Farce Fiction or Freedom?

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After working for a short time on the staff of the Supreme Court of Queensland he entered Pius XII Regional Seminary, Banyo, Brisbane, to study for the priesthood and was ordained priest in St. Stephen's Cathedral in 1953. Following appointments as Assistant Priest at Red Hill and the Cathedral, he continued his studies at the Gregorian University in Rome from 1956 until 1961 and in the latter year received the degree of Doctorate in Canon Law cum laude.

Returning to Brisbane Dr. Oxenham occupied the positions of Director of Catholic Missions and Migration and Resident Chaplain of Mt. Olivet Hospital for a number of years until 1965 when he was appointed as Administrator of St. Stephen's Cathedral, a post which he occupied for a decade. Since 1976 Dr. Oxenham has been parish Priest of St. Mary's, Ipswich.

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Cardinal Pietro Gasparri (1852-1934)
Father of the first Code of Canon Law (1917)

Shakespeare is a good place to start. In *Henry VI Part II*, Jack Cade the rebel talks about the Utopia he is about to create, "There shall be no money, all shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord". Dick the butcher responds with enthusiasm saying, "The first thing we do, let's kill all the lawyers." Cade replies, "Nay, that I mean to do". This attitude has long been prevalent, I am sorry to say. People seem frightened of the law, mainly because they do not understand it and because it has been presented without an adequate understanding of the role of law in the community and in the Church. The law is not a big stick. Our attitude towards it and to authority in general is the key to a right understanding of its healing nature. It should bring together, not divide.

Some people have been enveloped for far too long in the stupefying incense smoke of which Robert Browning spoke in his poem, *The Bishop Orders his Tomb at Saint Praxed's Church*. Indeed for some it could be the theme and the present nostalgic wish of their lives:

And then how shall I lie through centuries,
And hear the blessed mutter of the mass,
And see God made and eaten all day long,
And feel the steady candle-flame, and taste
Good strong thick stupefying incense-smoke!

We are attempting to disperse the incense smoke by a firm and balanced attitude towards the law. The fear of the law, a misunderstanding of its role, its long link with moral theology, its legalism and its out-of-date penalties have done much to produce a farcical and, in fact, fictional notion about Church law. This paper, put down especially for this audience, is a plea for balance, a plea for the pastoral understanding of its position in 1982 and onwards. The average person is no longer content with a system which produced some satisfied rule-keeping. But remember that even St. Paul had to establish rules of order and found it necessary to remonstrate with, and even confront, St. Peter, as recorded in the *Galatians*.

The Church and its law is a counter-culture. Its aim is to produce a balanced ecclesial community in the middle of a pagan one. This paper is not a plea for tolerance, rather is it a plea for the integration of minds and attitudes for the direct pastoral benefit of all the baptized. It is a reflection on current attitudes towards law in a canonical context. It has some personal thoughts on the occasion of the reported proximate promulgation of a new Code of Church Law. It is not, and cannot

be, a commentary on the canons of that proposed code. It will try to give some evaluation of the law to encourage a proper recognition of its faith in Church discipline. It will try to ask for a mental attitude in people that will make it credible to the People of God in 1982.

We live in an instant world. Chaos and anarchy abound in the political arena. It is a time of anti-authority. A pragmatic explanation is demanded for every action, God is not popular and Christ is looked upon in some quarters with suspicion, if not derision. There are some who would make of the law a scenario of fiction, which as its producer or director, they can manipulate and change to their own personal satisfaction, producing an achievement which is both hollow and dangerous. The Pilgrim Church in its progress is likely to reach a milestone, and soon. The preparation of a new book of laws has advanced so far that its promulgation could take place within months. Promulgation really means official publication and probably one more year will elapse before the laws take full effect. Even so, the time has come to raise the question of how the new norms should be introduced into the life of the community. After all, it is not enough to make good laws. They must also be well-received. The Church is in need of firm laws. We suffer from legal instability. This statement is not an idle one. If it is true that the legal life of the Church is in disarray, we need new laws, and urgently.

We grant that there is a belief abroad that there is no Canon Law any more. This belief, or the view that the Church is in disarray, is voiced mostly by persons, who, at some time in their lives, had a fleeting acquaintance with peripheral norms, usually concerning disciplinary observances. To make matters worse, owing to misguided teaching they often perceived legal trivia as issues of salvation or damnation. Just think of the disputes concerning the permitted quantity of food on a day of fasting, or the precise moment of midnight for beginning a fast. These disputes do not belong to law, but to moral theology. For example, it is the work of moral theologians to tell clerics what is the extent of the obligation mentioned in part of the new Canon 249 on clerics. It says "that clerics are bound daily by an obligation of *persolvendi* (of carrying through) the Office of the Hours according to the proper and approved liturgical books".

Unfortunately, we will always have fanatics with us, but we must remember that the philosopher George Santayana defined the fanatic as one who redoubles his efforts when he has forgotten his aim. The aim of the law, the lawgiver, and those who interpret it, is to produce order, balance and a

conformity with the mind of Christ, the spirit of the Gospel and the teaching authority of the Church. It can be done.

I am conscious that I am writing at a time of great uncertainty and doubt on every side. It is an age of instant coffee, instant television, headline news and telegraphic conversation. Science has advanced so fast that if one had been asleep for twenty-five years the waking up would be a fearsome and terrifying experience. It would be a strange world. On 4 October 1957, Russia launched its first Sputnik and the Space Age began. It is a time when Sir Bede Callaghan, the Chancellor of the University of Newcastle, can speak in 1982 of the possibility of the Australian family becoming an endangered species. It is a time when many people have been raised on a diet of colourless and unsubstantial teachings. It is a time of the industrialized world's march towards smaller families and zero population growth. It is a time when many people speak of the mixed blessing at the end of the umbilical cord. It is a time when three eminent Australians - Sir Barton Pope, Sir Macfarlane Burnet and Sir Mark Oliphant - have the belief that the problems confronting Australia and the world in the next one hundred years will be the most difficult in the history of mankind.

All these considerations do not leave a healthy atmosphere in which to inculcate a balanced view and a healthy attitude towards any law and the role of law in society, especially in the Church. Many a family home has been turned into a sacred shrine in which is enthroned the important new member of the family household - the television set. By the age of seventeen the typical boy or girl has sat for fifteen thousand hours in front of the flickering blue parent and been entertained by eighteen thousand murders.

Let us go back a little. The code of Pope Benedict XV of 1917 was the first collected book of Church rules. It was thought advisable, because European nations were doing it, to have a code at that time. Before 1917 the law of the Church was contained in the multitude of decretals, documents and papal statements, and interpretations thereof, which required a degree in algebra or trigonometry even to find the place and a considerable skill in crossword puzzles to interpret. This state of affairs was thought to be unsatisfactory for a mentality which produced the First World War.

In 1870 the first and unfinished Vatican Council was held. It started something which after more than one hundred years has come to a kind of flowering. The Benedictine scholar, Bishop Butler, was moved to defend it recently saying, "The Vatican Council I for all the deficiencies of organization and procedure that marred it, as such defects must have marred any comparable assembly in that century, may take its place with credit in the long roll of the Councils of the Church." From that date the lawyers, and the theologians, began again to think and write and, of course, to argue. The period leading up to 1917 was one of tremendous intellectual activity and many positions were taken which at the time seemed necessary for the good government of the Church.

In the Church law field, three names stand out - Father De Luca, Father Francis Xavier Wernz and Father Giuseppe Gasparri. Doctor Gasparri, later Cardinal, is rightly called the father of the first code. Father Wernz held the Chair of Church Law at the Gregorian University for twenty-four years. He was elected General of the Society of Jesus in 1906 and by then he had transformed the teaching of the subject in all the seminaries of Europe and America. To the amorphous mass of jurisprudence he brought some order. Pope Pius IX, on 16 August 1876, had started formally the Faculty of Canon Law at the Gregorian University. In the beginning it was merely a part of general theology. Father Wernz collected in his six-volume work many of the laws which helped Doctor Gasparri and his assistants to put together the code comprising two thousand four hundred and fourteen Canons. Unlike many of his successors, Father Wernz was always careful to keep a clear distinction between Canon Law and moral theology. In passing, I cannot help but remark that some modern attitudes are not so modern. Liturgical directives are confused with law and often given the force of law which they do not have. Derisions, divisions and polarizations arise from a direct invocation of the Holy Spirit as a replacement for reasoned thinking. By this attitude law is made unnecessary and confusion occurs.

Father John Baptist Franzelin, who was expelled from Rome in 1848 and returned in 1850 as Professor of Oriental Languages, was much involved in the Constitution on the Nature of the Church, which was finally accepted by the First Vatican Council. Cardinal Franzelin stressed the authority of God as the heavenly source of all truths otherwise inaccessible to man. But he was far from anticipating the emphasis on the goodness and love of God found in the constitution *Dei Verbum* of

Vatican II. He cannot be blamed, as we cannot be blamed, for being a man of his time, but the pietistic manifestations of religion did not impress him. He wrote in *De Divina Traditione*, "All those so called pietists base their faith on some spiritual emotion or sensible interior experience which resolves itself into a blind instinct, or in a fanatical manner derives its inspiration directly from the Holy Spirit".

It is far from my intention to underestimate the influence of, or the necessity for, the grace of the Holy Spirit in our Church and in our lives, but it is to be controlled by a balance in attitude supplied by an adequate understanding of the law. For example, I deplore the current teaching of some who would disregard the power of the Bishop to ordain a priest and place the emphasis and the source of authority in the choice of a local community. I am aware that it is a difficult time for many people, both religious and lay, who have become, and rightly so, full of the spirit of Vatican Council II. But we must remember always that that Council tried to let the Church see itself, and, as Thoreau said, "It is as hard to see oneself as to look backwards without turning round!"

I am conscious that I am speaking at the end of a long process of revision. We have been reading over the last year that the new code is finalized. The formal exchange of courtesies has been completed and the code is now in the hands of the Pope. It is described as an instrument for carrying out the intentions of the Council and gathering the fruits desired from it. It is not described as a code which will freeze the teachings of the Council, but rather it will allow them to develop according to the demands of both the universal and the local Church community under the guidance of wise, balanced, pastoral leadership. It will give more freedom of action to all the People of God. Freedom is in no way to be confused with doing what you like. That is a farcical procedure and leads to anarchy.

The code tries to take account of the mystery of the Church proceeding from a much wider viewpoint and correct estimate of the relationship of the Church to the modern world. It both defines and defends the broad notion of charity as a tool and not as an obstacle to pastoral action. On 29 October 1981, the work of the provision of the code, which has involved ninety-three Cardinals and Bishops from all over the world as well as one hundred and eighty-five Consultors and many drafts and revisions of those drafts, was given to the present Pope. Pope John Paul II at the time of its presentation quoted Pope Paul VI saying, "Law is not a hindrance, but a pastoral support. It does not

kill, but rather gives life. Its special function is not to repress or constrain, but rather to stimulate, to encourage, to protect and safeguard the area of true freedom".

We read (*Catholic Weekly*, 19 September 1982) that "the Pope is reviewing the code word by word." This statement, I may say, filled me with some trepidation. What is important is the spirit of the code which reflects much pastoral thought, study and prayer over the years of preparation. Some, in fact, over those years have expressed the view that it would not be advisable to promulgate a code at all at the present time. Some have said that it should be issued gradually, such as issuing a theological statement on a certain matter and then the rules which apply to that statement. In this way the Universal Church could assimilate gradually the desired teaching with an adequate pastoral result. That, of course, may not happen. There will certainly be discussions and disagreements because many people are expecting too much from the new code.

It is my opinion, and that of others, that it would be foolish to expect a long life from the code considering the wonderful things that are happening in the modern Church. These things, however, must not be allowed to happen in a haphazard manner. There must be always legal, pastoral and sensible direction for the common good of all. The code may last for thirty years, but we must not regard it in any way as an ultimate document. This mistake was made in the past. People expected too much from the old code and those in authority often hide behind the Canons to the pastoral and spiritual detriment of many. It is essential to understand what the new code cannot do.

It is, I stress, a book of laws which must be taken into account with all the other Church disciplines, for example, theology both dogmatic and moral, sociology, psychology, all the branches of psychiatry, the teachings of Scripture and the general teaching of the Church. The code is not, and never should have been, a Bible held over the heads of people like the Sword of Damocles. Do not expect too much from the code. Most of what has happened in the Church since Vatican Council II will be found there in one way or another. Some people, of course, will look for things that are not there - things which are still being discussed and should be, such as clerical celibacy and the ordination of women. These, although important questions, are on the fringe of mainstream thinking and could develop in the future according to pastoral needs. I see the code in this way as an

important event in which to review the practical effects of the Council and the revision itself and as a time to reflect on the meaning of law in the Church and its role in the life of our faith community. Laws should follow the rhythm of life. The code is a small, but essential, part of the whole Church structure. To me it is like the distributor of a motor car with its wires and connections. Without it, the car will not go. Without the Canons of Church law, the Church just will not go and, if the law is faulty and wrongly applied, there will not be a smooth and harmonious journey.

Archbishop Sir James Duhig is a good example of the middle-of-the-road mentality regarding law. His life spanned the two Vatican Councils. Ordained in Rome in 1897, curate at St. Mary's, Ipswich, riding about the country on his horse saying Mass for the people, consecrated Bishop of Rockhampton in 1905, he worked as a pastoral Bishop long before the promulgation of what it pleased the great man to call, with a flap of that famous right hand, when anxious to avoid an issue, "Dr. Gasparri's little book of rules". The law, I suspect, was more often invoked against him. Yet in the latter part of 1911, he preached in St. Joseph's Cathedral, Rockhampton, a now famous sermon setting out in felicitous detail the provisions of the *Ne Temere* decree which came into force on Easter Sunday, 1908. This sermon upheld the Church's doctrine regarding the dignity and sacramental nature of marriage - "Above the din of the world, above the noise and the contradictions of philosophers and novelists, the voice of the Vicar of Christ has sounded and has been harkened to by his spiritual children throughout the entire world", then, "The Church that lost kingdoms rather than violate its sacred charge as the custodian of the sacrament of marriage is not likely to recoil. Her marriage regulations, far from being inimical to the civil power, are one of the greatest guarantees and safeguards of law and order". He also referred to the "marriage shops, which are a scandal to the Christian community". The code of 1917 really made little dint on Archbishop Duhig's progress. He had been so long without it. His use of it, therefore, was wise and balanced. It was not his prop when things became rough. Yet he would have smiled assent when Monsignor John English in a lecture to his students at St. Leo's College, Brisbane, in 1927 said that "the code and the code alone is the authentic source of all existing disciplinary legislation in the Church ... the code is the greatest achievement of legal scholarship in the history of the Church." So the years rolled on, the winds of change began to blow, Pope Pius XII sensed the desire for reform and Archbishop Duhig took a fancy

to the television cameras, but never to the box. He faced the coming Council with apprehension saying, There never was a Council, but after it we had a schism!"

Pope John XXIII, in 1959 in the Basilica of St. Paul's Outside the Walls, announced the revision of the code and his intention to call a General Council to the consternation of many Cardinals and Roman officials who sensed "trouble" ahead. In 1962 much happened. The balloons went up in more ways than one. The years of rebellion began. The machine" must be destroyed. It was the individual versus the community. On 20 February 1962 Colonel John Glenn hurtled into space and the world held its breath and the marathon vigil began. In the Midlands of England a young musical group was collected. It sent waves across the world and was the focal point of change in attitudes in another sphere. It was called "The Beatles". The Bishops of the Catholic Church assembled in Rome for another marathon performance, presided over, in the beginning, by that genial agent of the Providence of God, Pope John XXIII. The Christian faithful and others waited and hoped.

Now twenty years later, when the new code is expected and the post-conciliar expectancy and euphoria has died down, Father Mark Coleridge in the September, 1982, edition of the National Council of *Priests' Newsletter* can speak of a crisis of confidence. I agree, but would speak also of a crisis of leadership. Fear is creeping back. It must be thrown out smartly. We have no need of it. But there is fear and trepidation in the governed and perhaps sometimes fear and uncertainty in those who govern. Sensible attitudes towards the law are necessary. We need to understand what the law can do and cannot do. We, for example, must not lump all directives together. A wide choice in liturgical directives can lead to confusion. Liturgy rules give us space in which to worship God properly and with meaning. But similar interpretations applied to the law can lead to farcical interpretations, for example, "in these or similar words". We cannot say, "in the words of the law or in similar words of our own making", as to what we would like the law to say. In the field of common law, Lord Denning was in trouble recently because he forgot that juries are there to reflect the mind of the people and the community as it is, not as it was, or as Lord Denning would desire it to be. So it should be with the new Church legislation and authority which is, or should be, designed to deal with Catholic people as they are now. Objective not subjective attitudes are wanted.

One of the more important events in the Australian Church in the legal field has been the foundation of the Canon Law Society of Australia and New Zealand in 1967. It came shortly after the Council finished and at first produced a mixed reaction. Some thought it was going to proceed too fast, others feared it and some even hoped it would be a return to pre-conciliar rigidity and legalism. It has proved to be a firm, pastoral, progressive society of great assistance to the Bishops, priests and people of the two countries. Other important events have been the foundation later of the Institute of Matrimonial Practice based in Sydney; the reorganization of the Metropolitan Marriage Tribunals; and the establishment of a National Tribunal of Appeal in Second Instance. The consequence of all this has been the production of a body of good, balanced, pastoral jurisprudence. The National Conference of Bishops was reorganized and, to a certain extent, updated.

Rev. Doctor Ronald Mulkearns, now Bishop of Ballarat, in the inaugural paper to the Canon Law Society in Brisbane on 20 June 1967 set the tone for much of the canonical happenings in this country since. He spoke of the relevance of the law to our times (let us remember too that the Vatican Council decrees are still only pastoral directives and have not the force of law until incorporated in the new code); of the mentality of people; of the fact that law is not the essence of the Church, but rather that its object is the common good; of its aims as protecting our rights; and of the need to examine our consciences. He called for a change of attitude towards the law. He gave one example of farcical and frustrating law by citing the futility of being instructed to cite a party whose whereabouts were unknown by nailing a notice to the Marriage Tribunal door in case the person, who was probably in another country anyway, happens to pass by! This is called a legal fiction. But he said also, "A law which is properly formulated and expounded should show that freedom is not eliminated in the Church, but is guaranteed, and that responsible decision in the light of the Gospel teaching can be left to the individual in many things". He then expressed the farseeing hope that "the future code contain only the most important and most basic laws and principles, and that several particular or regional codes be promulgated by the Bishops of particular nations or communities". This is, in fact, what is about to happen or should happen.

Everybody, of course, is asking what type of law will be given for the lay person. The number of Canons has been reduced from two thousand four hundred and fourteen to one thousand seven

hundred and twenty-eight. The lay people should be grateful in many ways, and not too many laws have been made about them. It will allow them to develop their particular role in the Church under the direction of the Bishops' Conference and the local Bishop. Since the constitution *Lumen Gentium* of 21 November 1964 there have been at least nine major papal documents dealing with the work and apostolate of the lay person in the Church. These, I might say with regret, may be still neglected by many who are unaware of the vast riches and inspiration they give to the lay vocation. These must be taken into account in considering the few Canons in the code which deal with the laity. I am sure that this has been done by design. It allows greater freedom of movement and both experimentation and striving forward to discover the most helpful lay ministries in the years ahead. The Canons are very general. They start with baptism as the incorporation into Christ which makes one a person in the Church, that is, a subject of rights and obligations. These latter apply to all the Christian faithful without any distinction of ministry or sex. Associations of the faithful are mentioned distinguishing them from religious communities and institutes of consecrated life. This proposed legislation retains a more general character than that of the current code. It is an oversight perhaps that the ministries of lector and acolyte are still reserved to men.

The role of the laity has been extended and there is great pastoral support for the married. The advances in behavioural sciences will be of great advantage in assisting the interpretation of the laws of marriage. The laity has the role of sanctifying, teaching and, in some ways, governing. They may officiate at baptisms, distribute the Eucharist, receive the vows in marriage and, in certain cases, officiate at Catholic funerals. They may prepare others to receive the sacraments. They may hold the office of lector and, in their role as catechists, share in the missionary work of the Church. They may be delegates to Diocesan Synods and some Church offices and duties have been opened to them, for example, the appointment as a Judge on the Matrimonial Tribunal, which incidentally has not been limited to men.

The notion of the tremendous importance of covenant in marriage will appeal to the committed Christian and the stress laid on the good of the spouses and the generation of children, in that order, will have an enormous effect on pre-marriage instruction and a successful community of life. These pre-marriage instructions are dealt with in proposed new Canon 10 1 6. The notion of the partnership

for the whole of life has been stressed recently by Pope John Paul II, but the code does not define its elements because these will vary from country to country and from sub-culture to sub-culture.

The code could not possibly satisfy all the desires and aspirations of our lay people, but, as many things have been anticipated already pastorally, the lay people will have some idea already of their growing importance and role in our modern Church. The advantage of the code is that all relevant ideas and directives have been put into the one place. It is to be stressed that the laity do not simply share in the work of the clergy. One must be careful always not to confuse one ministry with another. The sacramental and eucharistic ministry of the priest is from Christ and is the core of the Christian community. The lay person has the unique role of bringing the spirit of the Gospel into all aspects of secular life.

The new code gives a rule for the free action of creatures. It will give much more discretionary power to the local Bishop and to the National Bishops' Conferences. This, of course, will entail a degree of consultation with the laity and also considerable pastoral insight on the part of the Bishops to make sure that what is done is for the good of all the community according to the limits of the law and its spirit.

It would be possible to say, according to the draft, that the number of excommunications has been reduced from thirty-seven to six. These excommunications are still called automatic, but the persons committing them must know of the sanction imposed. The six are for extraordinary crimes which one would hope would never happen, but it is important to note that one of the six is the crime of abortion.

One interesting example in the new code relates to the laws of fast and abstinence. Some form of abstinence will probably be introduced by the new code, because it has become apparent that the relaxed laws on these subjects are not achieving the desired spiritual end. It is clear that this will be a delicate subject and, if the law is imposed, it would be foolish to impose it willy-nilly without a thorough consultation with the people whom it will affect. The Bishop or the Bishops have the authority, but they also have the obligation of authority to consult with the people. This, for some,

could be a delicate and worrying experience because it is an art, to co-ordinate consultation in order to produce a firm pastoral policy without the seeming loss of authority. A law which is imposed from on high by saying, "This is what we will do," cannot be a good law. That attitude of late has produced even more tension in some quarters.

All this is relevant in our approach to the new code's decrees concerning the Parish and Diocesan Councils, the Senate of Priests and the Board of Priests who are to advise the local Bishop. A general balance and pastoral respect for the new code will do much to correct the impression of J. Derek Holmes who wrote recently, "The post-conciliar Church has had an identity crisis and at times seems to be cracking at the seams". The code is aware of the pluralistic society in which we live, as well as the doctrinal disciplinary and sociological developments which have happened in the last twenty years. A solid, well-written and well-considered revision will be useless without the understanding and co-operation of all people of goodwill to make it work.

A peculiar and interesting development is occurring in the development of Church law concerning marriage. Marriage is perhaps the most difficult sacrament both from a theological and vocational point of view. Its history is fascinating and sometimes verges on the farcical. Certainly, Moses said, "What God has joined together men must not divide". The question is, what has God joined together? Who has known the mind of the Lord, or who has been his counsellor? Like most other questions in law, it is a serious mistake to think that this is a black and white area. It is interesting that, over the last twenty years, Church matrimonial lawyers have been in the forefront of creating and developing a theology of marriage. The process taking place is that of the English common law system, in which the Judges make and interpret the law, not the Parliament. Some today disagree with this. But it is the way the English common law system has always worked, whereas, with the Church, we used to start with the Canon or Canons and try to fit cases and peoples' circumstances into the framework of those Canons. In the Church, Rome, that is, the Roman Curia, under the Pope, promulgates the law, but this, because of the decided lack of an adequate theology of marriage and a misunderstanding of the role of law, has proved far from sufficient to meet the fast-changing sociological and psychological sciences. The Judges, particularly in those countries which have been described as "Beyond the Seas", have developed a matrimonial jurisprudence based on the documents of Vatican Council II

and an increasing knowledge of a person as a person and of the vital role of interpersonal relationships in marriage which is more in keeping with circumstances of life and love in 1982. All this has now influenced the thinking of the lawgiver and the wording of the new code.

Let me review what has happened. I remember in the middle 1940's a great controversy which erupted as a result of, and the condemnations which followed, the writings of certain theologians concerning the ends of marriage. It may be noted in passing that no one has yet succeeded in defining marriage in words which are acceptable to all. Some people, especially those who are married, think that they know what Christian marriage is and what it is all about. This is not sufficient, and most Catholics will be impressed by the definition of marriage provided by the new draft code. This is given in several statements which set out the developed jurisprudence taken in conjunction with the teaching of the Council. We once read, "The primary end of marriage is the procreation and nurture of children", and that the secondary end is mutual help and (that glorious phrase) "the remedy of concupiscence". We read also that the essential properties of marriage are unity and indissolubility which acquire a unique firmness in Christian marriage by reason of its sacramental character. We read that marriage is created by the exchange of consent between the parties and that this consent is to perpetual and exclusive right over each other's body for acts which are of themselves suitable for the generation of children. It may well be asked, "Where does love come in? What then is my marriage all about?" It is understandable, therefore, that since the first code of 1917 there have been many debates about this cold and mathematical wording.

Many debates could be and have been conducted about the required relationship (as, for example, by St. Paul) between a man and a woman and the required relationship between Christ and His Church. Vatican Council II places the emphasis on marriage as a community of love. This notion of *communio* is essential to a balanced understanding of the current attitudes of ecclesiastical Judges to marriage and indeed to the attitude of those who govern towards their subjects. *Gaudium et Spes* and also *Humanae Vitae* have compelled a searching re-examination of the law regarding marriage. We read in the first document that the marital institution itself and marital love have as a natural characteristic a direction towards procreation and nurture. Indeed they come to their natural completion in procreation and nurture. This sentence could be the turning point in present thinking

about the sacrament of marriage. Gradually people began to think, not of ends in themselves, but of the meaning behind the words taken in relationship with a breathing, loving and frail human person.

In 1944 the traditional doctrine was reasserted and seven years later Pope Pius XII rejected any debate in this matter. Vatican Council II, however, treated the issue as an open one - result of the interplay of thought that went on between 1944 and 1962. The doctrine of marriage has been developed to a point where one reads in a Canon of the proposed new code, "The marital covenant, by which a man and a woman create between themselves an intimate sharing in all life, a sharing of its nature oriented to the good of the spouses and to the procreation and nurture of children, has been raised, when it is of baptized persons, to the dignity of a sacrament". Another Canon reads "Marital consent is an act of the will by which a man and a woman give themselves and accept one another in an irrevocable covenant in order to create a marriage". It is to be hoped that it is not presumptuous to comment that those statements come closer to reflecting what happily married Christians feel about their marriages than the present Canon Law definitions. A tremendous responsibility has fallen on the shoulders of those whom Father Richard McCormick has called "the martyrs of the Matrimonial Courts" in the last fifteen years, and even earlier. The Matrimonial Tribunal functioning efficiently and with enlightened support from those in authority has an acute pastoral responsibility today more than ever.

There can be many forms of deep, lasting and healthy friendships between two people without the sacrament of marriage and, of course, without children. We cannot, however, have children without the sacrament and covenant of marriage. Some people who are married and have children seem to forget all about the friendship they once had. Chaos, much confusion and unhappiness are caused to both the people involved and the children produced. A good marriage, to my mind, is one of a strong abiding friendship.

You are aware of the tremendous discussions and considerable wounds arising from issues that are very close to the heart of our lives. These are by no means decided in the proposed code. Many would wish to have clear-cut statements as to the remarriage of divorced Catholics; the admission of divorced Catholics to the reception of the Eucharist; the question of the power to dissolve

consummated sacramental marriages; whether or not a Christian marriage could die while the parties are still alive; and whether or not the doctrine of the Eastern Church that allows divorce and remarriage in the case of adultery is part of a strong tradition that could be shared by other Churches. It is desirable, and acutely so, that these issues be faced. Constant pastoral problems are confronting the working Bishop and priests causing them and the people with whom they are dealing a great deal of anguish. Development of the theology pertaining to these matters is essential so that an adequate pastoral law can be formulated. Particularly regarding marriage law, there has been over the years a great development in the approach to people already bound by some bond to another. We can go back in history to the Pauline Privilege; the unconsummated marriage; the marriage of pagans; the marriage of what is sometimes called "the privilege extended to Indians and Slaves"; and marriage of a man or woman with many partners. If all these have produced a legislation which is partly satisfactory, the slow process must go on in a society which is becoming more complex daily.

One must be very careful in talking about this subject not to enter the field of moral theology, which, as I have said, is often confused with the law itself. In many cases it is the role of the moral theologians to state the extent of an obligation imposed by the law. The correct order is for the law to follow a well-defined and reasoned theology, but the law does not legislate in matters of morals, although at times the question of a right understanding of conscience has a great deal to do with effective and balanced pastoral action concerning marriage. There is a deep awareness that marriage in the Western World is in a state of considerable transition. There is no doubt that the emancipation of women has played a big part in this, and rightly so. For example, in Australia in 1981, forty-one thousand five hundred people were involved in divorce cases, the average length of marriage being ten years. You can see what an effect this is having on the work of our Matrimonial Tribunal when a divorced person wants to have a permanent relationship with a Catholic who wishes to remain a full member of the Catholic sacramental community. Closely allied with the preceding is the problem of contraception, which Doctor John Dominian calls "the most wounding of all the internal tensions in the Church". This is not my subject, but you realise, of course, how this question deeply affects the interpersonal relationships of married people.

Conscience must be mentioned in any talk on Church law. Today many would replace law by conscience. An appeal to conscience is made to overrule the law and justify a way of acting. It is indeed a difficult and delicate subject, but it is an insult to a right idea of conscience to make of it an excuse for acting outside the law. Sometimes the judgement arrived at and the appropriate action taken could be the correct one, but conscience should not be used as a blanket or a scapegoat, for example, in solving certain cases involving the marriage bond. It is in this area that some would make a farce of the law, to the eventual spiritual detriment of a person and to general undesirable pastoral results. Hasten slowly, and with a clear idea of what one is doing, should be the motto.

Just how far this appeal to conscience can be taken is evidenced from a report in *The Tablet* of 25 September 1982. It concerns a series of questions about their attitude to authority, especially papal authority, put to two hundred people attending six of the events associated with the recent papal visit to Britain. It shows how strong the polarization is between accepting membership of the Church in general and doing one's own thing, or making up one's own mind, basing the justification for action and bridging the gap by an appeal to conscience. It shows how much the attitude towards law has changed or how bad the teaching of the law has become, that the law is treated as a non-event. If a law is not acceptable to the majority of the people, it is, in most cases, a bad law. However, it must be said that many people reject a law because it is presented to them in black and white terms. There are always a lot of grey areas surrounding any law and its interpretation. For example, the difference between the Anglo-Saxon and the Latin mentality, if understood correctly, helps enormously towards a balanced attitude to any given law. The Anglo-Saxon mind and legal system has given us a broad law with a narrow interpretation. This is called the letter of the law. The Latin (that is, Roman) mind and legal system has given us a narrow law with a wide interpretation. This is called canonical equity. A classic example is Canon 29 of the old code, namely, "Custom is the best interpreter of laws". Blind acceptance of a law has never been asked for by the Church. There is a paradox involved sometimes in a direct "Yes" or "No" to a law. The law cannot always come down to the people's level, nor can he who is pastorally wise.

There is a general air of anti-authority around. This attitude comes from a diffidence in the teachers; a hesitation in those who govern; the general idea that one is old-fashioned if one relies

upon authority; a feeling that certain ideas are not feasible in the modern world or out of step with modern living; and an idea that some people have that one has to make up one's own mind about the big decisions in life and listen to one's conscience. These are the ideas that appear over and over again in the survey conducted. Conscience is one of the most difficult, most sensitive areas with which the modern Church has to contend. A wrong attitude towards the idea of conscience and its authority in one's life can produce only chaos and confusion.

The balance required for a clear, open, informed and faithful conscience is one of the longest and hardest tasks of man. It is a moment when he stands alone before God and looks straight at Him. The Vatican Council says that in the depths of his conscience man finds a law written by God:

To obey it is the very dignity of man: according to it he will be judged. Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths. (*Gaudium et Spes*, N. 16)

The phrase "alone with God" expresses the true nature of conscience. It is a hard concept because many people are afraid to be alone with God, to face a moment of truth. True conscience is always an isolated decision in which he takes full responsibility before God for his own decisions. Many are afraid to do this. Remember that in most cases conscience will tell a person to obey the law. But the primacy of conscience must be stated clearly. We should not be afraid to stand alone before God because that is exactly what He wants us to do so that we may grow as human beings. The one absolute requirement is that a person do his utmost to ensure that the decision his conscience comes to is the correct one, that is, to have what is known as an "informed conscience".

One of the greatest pastoral, legal headaches is the vexed question of the married divorced, who are in a proved stable union, being admitted to full sacramental union with the Church. that they must reject their new responsibilities as a necessary condition for forgiveness and restoration to sacramental life? Two reasons are given for the refusal to admit them to the sacraments. Firstly, "They are unable to be admitted thereto from the fact that their state and condition of life objectively contradict that union between Christ and the Church which is signified and effected by the Eucharist." Besides this, there is another and special pastoral reason, namely, "If these people were admitted to the Eucharist, the faithful would be led into error and confusion regarding the Church's teaching about the indissolubility of marriage." This will not go away. As Father Charles Kindregan in his *Theology of*

Marriage says, "The Christian people are no longer satisfied with the crumbs that fall from the canonical table". It is both a theological and a legal question, both with intense pastoral connotations.

Despite a long and well-thought-out argument being presented at the Synod of Bishops in 1980 by Cardinal Hume, Archbishop Worlock and other Bishops, the question was not solved to the satisfaction of many by the letter of Pope John Paul II, *Familiaris Consortio*. It remains one of the most difficult and heartbreaking of present pastoral problems. But it is no solution of it, for priests or people to take the law into their own hands using either conscience or common-sense as their weapons of stupidity! It is interesting to note, apropos of the above Apostolic Exhortation, that Pope John Paul II during his recent visit to England, especially in the stadium at York, underlined the positive aspects of family life today which include a more lively awareness of personal freedom and greater attention to the *quality* of interpersonal relationships.

Father Normand Provencher, O.M.I., of the Faculty of Theology, University of St. Paul, Ottawa, Canada, writes:

I believe that the answer to the question of readmission to the sacraments is found in a way that expresses the mercy of God and respects the dignity of Christian marriage. Moreover, it must be remembered that marriage is first of all a terrestrial reality whose structures and rights derive from nature, society and culture. In its concern to respect the autonomy of terrestrial realities, the Church recognises a real value in the natural and civil marriages of the non-baptized. Now, could it not be possible that the Church should accept and take seriously the remarriage of divorced people which is lived in faith and charity, without its being solemnized in the sacrament? Thus the indissolubility of the first marriage would not be questioned, because there would be no repetition of the sacrament, but there would not be concubinage. In this way, we open the door for the admission to the sacraments of certain divorced remarried people, if the Church judges this position in conformity with the Gospel and its tradition for the men and women of our day.

These questions are quite legitimate, but the answers to them are at least slow in coming. Surely they must be considered if our Western tradition is to be the richer and people are to have the benefit of other traditions. These are issues for the future. The dilemma for a canon lawyer is this - the aspect of the ideal and the aspect of the real. The ideal aspect is the law in its seemingly perfect state as expressed in the Canons. The real one is the way the law operates in often imperfect circumstances as it affects in concrete the lives of Christian people living in communities. We must beware of causing injustice in the real world with adverse effects on the human community which is, as we are well aware, so full of limitations. Marriage Tribunals are essential for the pastoral operation

of the Church. They operate in the field of human failing and their officers are constantly exercising a ministry of both justice and mercy under the law. This can cause great tension in the officials of the Matrimonial Tribunals and sometimes also in the people who are seeking to participate in the pastoral benefits available through an adequate Matrimonial Tribunal applying current legislation and jurisprudence to the full. But, as has been said, "We must beware of trying to create a fairyland in our tribunals".

Archbishop Bemardin, just appointed Archbishop of Chicago, said recently that Catholics would generally be pleased with the final text. Father Bertram Griffin, a Past President of the Canon Law Society of the United States of America, tells us that it is a "good code". Of course, all now depends on the Pope. Theologians have objected to many of the previous drafts saying that they were not pastoral enough. While many people over the last fifteen years have questioned the need for a code at all, it will be obvious that some laws are necessary for the balance of the Church's operation. Without law there is chaos. Bad law produces chaos. Both over-government on the one hand and under-government on the other produces confusion. The law is not a weapon. It is a definition of the limits within which we can act. I am sure that most thinking Church people will be grateful for a code which brings together the current situation in many fields. If used properly, it will serve the People of God very well. But so much depends upon the general attitude towards it, the balance with which it is handled and the desire of all people to work together for the building-up of the Body of Christ. It cannot be stressed enough that the role of the law, like that of the priest, is to serve. It is greatly desirable to have service rather than domination and to have authority which is pastoral, but at the same time firm.

How do we fit Church law into the turmoil of a world in which we are involved and in which we are trying to be faith people, loyal to the tradition of our faith community (or Church) and loyal to the teaching authority of this large community? What can the law give and how can it assist us in our pilgrim way to God? If the law has become a farce to many and if many make it so by stupid actions and opinions, what can we do to make it creditable and acceptable as an aid to action and pastoral health? If law is regarded as a gigantic legal fiction set up by Rome to keep the faithful under its control, what can we do to change that attitude to legal and relevant facts that matter to us? If the law

does not give us freedom, it is useless. Traffic lights control our actions, but give us freedom to move in harmony.

The Scriptures praise the wisdom of God who "made a weight for the winds, and weighed the water by measure, when He gave a law for the rain and a way for the sounding storm" (*Job: 28*). Our code is essentially a norm regulating human conduct. It is a rule for the *free* actions of creatures. It is a standard binding the conscience of men and instituted by public authority for the common good. It is in this sense that St. Thomas Aquinas uses the words when he describes law as a regulation in accord with reason promulgated by the head of the community for the common good and in the same sense it is received by Suarez, the Church's classic author on laws, when he defines law as *praeceptum commune, justum et stabile, sufficienter promulgatum*.

The word code means the *trunk* of a tree and has many derived meanings. The essence of the word is one of strength from which other shoots grow. What is asked on our part from the new code is *metanoia*, a change of heart or mind towards law in general. The law gives us freedom to love and this new law allows freedom for development. The 1917 code was a book for professionals written in Latin. This code has eight Canons on the laity and sixty-six on clerics. Thus, the laity has a far greater freedom in the Church. Authentic freedom is to be able to move, to do, to be, to achieve, within a defined area that is wide enough to let us move. Take away the fence about which G.K. Chesterton spoke and the possibility of total harmony is destroyed. The law is a means to achieving ends more effectively. The fence around the community helped it to act happily and in harmony.

The law can cause tensions, dilemmas, conflicts and polarizations about which we should be aware. It can cause a conflict of rights, the tension between the spirit and the letter of the law. How do we get stability without losing flexibility? The law should be seen as creating unity amid diversity, but this will not happen on its own. It is people who must be active to create this harmony. Rev. Doctor Geoffrey Robinson, current President of the Canon Law Society of Australia and New Zealand, rightly explains that "law exists at the point of tension between opposing needs". That is why a great deal of balance and understanding is necessary. For example, a simple, but important, example of polarization and a dilemma is that of clerical dress. The present Canon 136 does not mention the

clerical collar, but it does speak of the *corona clericalis*! Clerical dress divides the clergy and the laity if no one in authority is active to create harmony. A good deal of balance is required to prevent positions being taken which lead to absurdity and farce on both sides.

We cannot take the law into our own hands. We are not lawbreakers or lawmakers. We are developers of the law and, if we observe the law, we are developed by it. Our freedom under the law is broadened by the right use of the principle of subsidiarity used so well by Pope Paul VI and supported by Vatican Council II - that principle by which those in authority do not do what can be done by those lower down. It is a principle of shared responsibility. We are not to restrict activity and the development of ideas lower down the scale of action. The larger community should not supplant the smaller in doing the tasks which the smaller can do. But there is one great tension which must be understood thoroughly. Christ is the pivot - the person of Christ and His two natures. So we have the constant tension between the humanity and divinity because both elements are found in the Church. If we forget one, we are finished, for law is an expression of the humanity of the Church, which is a community of Christians.

Canon Law has been with us always and played a prominent part in the development of our civilization, and today, as Father Ladislav Orsy wrote recently, "It is vigorous enough to keep a worldwide religious community in reasonable balance. No mean achievement this balance, because as every student of history knows, there are no fights so fierce as fights among the faithful who disagree about the message of salvation". It is the task of the law and those who receive it, and administer it, to keep this balance.

So we progress to this point in 1982 from the model of the Roman *imperium* (of which the prototype was the absolute power of the *paterfamilias*) to another model, inspired by all that is in the word *communio*, where all the members, conscious of their own power and dignity in the Spirit, contribute steadily to the building-up of the social body. Finally we ask God with Father Karl Rahner, "Are You truly the spirit of freedom in my life or are You not rather the God of law? Or are You both? Are You perhaps the God of freedom through law? Your laws, which You yourself have given us, are not chains - Your commands are commands of freedom". So we return to the notion of healing. We

have, through a balanced acceptance of the new code, to heal the ravages caused by too much authority on the one hand and too little authority on the other. I conclude with St. Paul in 2 *Cor.* 3:17 - "The Lord is the Spirit, and where the Spirit of the Lord is, there is freedom."